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# EQUALITY AS A CHARTER VALUE IN CONSTITUTIONAL INTERPRETATION<sup>+</sup>

Peter W. Hogg<sup>\*</sup>

## I. EQUALITY IN THE CHARTER OF RIGHTS

Section 15 of the *Charter of Rights* is the primary guarantee of equality<sup>1</sup> in the Charter. Subsection (1) of section 15 provides as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 did not come into force until April 17, 1985, three years later than the rest of the *Charter of Rights*.<sup>2</sup> This delay, which was intended to allow time for the legislative bodies to review their statutes and cleanse them of discriminatory provisions, meant that cases arising in the first three years of the life of the Charter could not make use of section 15. We shall see that this delay caused the Supreme Court of Canada to look to freedom of religion rather than

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<sup>1</sup> Section 15 is supplemented by s. 27 (multicultural heritage) and s. 28 (sexual equality).

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, sub. 32(2).

to section 15 in order to decide the Sunday closing cases that came up during this intervening period.<sup>3</sup>

The Supreme Court of Canada, in interpreting section 15, has imposed two important restrictions on the scope of its apparently broad language.<sup>4</sup> First, *Andrews v. Law Society of British Columbia*<sup>5</sup> held that section 15 did not prohibit all distinctions made in statutes but only those based on the listed grounds or grounds analogous to the listed grounds. While the Court has not been very clear about the characteristics of analogous grounds, such grounds must bear some important similarity to the listed grounds, and this excludes many statutory distinctions from section 15 review. An important exclusion is occupation, which is a freely chosen status, unlike the generally immutable listed grounds of discrimination, and so laws that draw distinctions between persons in different occupations are not subject to section 15 review.<sup>6</sup> We shall see that this particular exclusion has led the Court to look to section 2(d) (freedom of association) rather than section 15 in reviewing the exclusion of agricultural workers from Ontario's labour relations law.<sup>7</sup> Another important exclusion is place of residence, which is also a freely chosen status that does not qualify as an analogous ground, and so laws that draw distinctions between persons in different parts of the country or different parts of a province are not subject to section 15 review.<sup>8</sup> We shall see that this particular exclusion has led the Court to look to section 3 (the right to vote) rather than section 15 in reviewing discrepancies in the size of electoral ridings in Saskatchewan.<sup>9</sup>

The second important restriction on section 15 was announced by the Supreme Court of Canada in *Law v. Canada*.<sup>10</sup> In the *Law* case, the Court held that a law that imposed a distinction on a listed or analogous ground was subject to section 15 review only if the law also impaired "human dignity." This vague concept was not defined, although the Court identified a series of "contextual factors" to help in identifying breaches of human dignity. This new requirement has the effect of further narrowing the class of legislative distinctions that are prohibited by section 15. In that case, for example, a distinction based on age (a

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<sup>3</sup> See text under heading III. "Freedom of Religion," below.

<sup>4</sup> Hogg, *Constitutional Law of Canada* 4th ed., looseleaf (1992), ch. 52, attempts a comprehensive account of the case law.

<sup>5</sup> [1989] 1 S.C.R. 143.

<sup>6</sup> For example, *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 44 (membership of police force not analogous ground; therefore, no s. 15 review of exclusion of police force from collective bargaining statute).

<sup>7</sup> See text under heading IV. "Freedom of Association," below.

<sup>8</sup> The caselaw is described in Hogg, *supra*, note 4, heading 52.16, "Place of residence."

<sup>9</sup> See text under heading V. "Right to Vote," below.

<sup>10</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

listed ground) in the Canada Pension Plan<sup>11</sup> was upheld because those persons who were denied benefits because of their age had not, so the Court held, had their human dignity impaired. A similar decision was reached in *Gosselin v. Quebec (Attorney General)*,<sup>12</sup> where the Supreme Court of Canada upheld a Quebec welfare scheme that paid lower benefits to persons under 30 unless they participated in stipulated educational or work programs, in which case higher benefits were payable. Persons over 30 received the higher benefits automatically without the requirement of participation in educational or work programs. Although this regime relied on a distinction based on age, it was upheld because the recipients under 30, who were subject to the more stringent regime, had not, according to the Court, had their dignity impaired.

All of the rights in the Charter are subject to section 1 of the Charter; that is to say, the rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The Supreme Court of Canada in *R. v. Oakes*<sup>13</sup> and subsequent cases has developed an elaborate set of standards for the determination of whether a law is justified under section 1. A law that infringes section 15 of the Charter will be upheld if the *Oakes* standards are met. For example, mandatory retirement is a law that was held to infringe section 15 but was upheld under section 1.<sup>14</sup> But of course one never reaches section 1 unless there has been a breach of a guaranteed right, and so laws that do not employ a listed or analogous ground of distinction, or that do not impair human dignity, are upheld without recourse to section 1.

While the Supreme Court of Canada with its right hand has been building the elaborate structure of interpretation of section 15 (and section 1), with its left hand it has been finding ways of applying an equality “value” that is liberated from the restrictions on section 15. The purpose of this paper is to examine this phenomenon. We shall see that there are cases where other Charter rights do the work of the equality guarantee, including the interesting cases where section 15 is not available, either because it was not in force, or because the requirement of an analogous ground or human dignity would bar any remedy under section 15. We shall see that a claim that an equality right has been breached can sometimes be upheld under the aegis of another Charter right (the freedoms of association and religion and the right to vote will provide our clearest examples), because that other Charter right contains within it an equality component that is not restricted in the same way as section 15.

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<sup>11</sup> *Canada Pension Plan*, R.S.C. 1985, c. C-8.

<sup>12</sup> 2002 SCC 84.

<sup>13</sup> [1986] 1 S.C.R. 103; for commentary, see Hogg, *supra*, note 4, ch. 35.

<sup>14</sup> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

We shall also see that when an individual asserts a Charter right the Court will sometimes recognize the equality rights *of others* as part of the context in which the claim must be assessed. Freedom of expression, for example, is occasionally invoked to protect hateful messages that come into conflict with the equality rights of women, children, or minority groups. And the right to full answer and defence of a person accused of sexual assault is occasionally invoked to justify invasive inquiries into the past sexual history of complainants, which brings the right into conflict with the rights of privacy and equality. In these cases, the Court has been attentive to the equality value, despite the fact that it is asserted in opposition to the person who is actually asserting his or her Charter right.

Before elaborating the points made in the previous two paragraphs, a brief explanation of Charter values is needed.

## II. CHARTER VALUES

The concept of “Charter values” has been invented by the Supreme Court of Canada to mitigate the fact that the *Charter of Rights* applies only to governmental action. Although governmental action is a broad concept, it still leaves a sphere of private action that is not constrained by the Charter. The exclusion of private action entails the exclusion of that part of the common law (of contract, tort, and property, for example) that regulates the actions of private persons and organizations. But when the Court has been confronted with a plausible claim that the common law offends the Charter the Court has not been able to bring itself to say simply “too bad, go and talk to the Legislature.” In the leading case of *Dolphin Delivery*,<sup>15</sup> which was a labour dispute between private parties, McIntyre J. for the majority of the Court said that the common law can be modified by the Court in order to bring it into line with “the fundamental values enshrined in the Constitution.” Thus the concept of Charter values was born. While the Charter does not directly apply to the common law, the common law should respect Charter values and will in appropriate cases be amended so that it does respect Charter values. And, in reliance on this doctrine, a number of common law rules have in fact been modified, so that in practice there is not a great deal of difference between the direct application of the Charter to statute law and the indirect application of the Charter to the common law.<sup>16</sup>

Every Charter right is probably also a Charter value, but the latter is stated at a higher level of generality, without the detail that the Court has carefully en-

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<sup>15</sup> *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at 603.

<sup>16</sup> Hogg, *supra*, note 4, ch. 34, Application of Charter, under heading 34.2(g), “Common law.”

grafted onto the actual right, and the section 1 analysis does not follow the strict protocol established by the Court in *Oakes* but is “more flexible.”<sup>17</sup> It is this broader, more flexible concept that is being used by the Supreme Court of Canada, not just for the purpose of developing the common law, but for the purpose of interpreting the Charter itself. In particular — and this is the topic of this paper — the Charter value of equality is being imported into the definition of the other Charter rights or into the section 1 analysis. In this way, what are really equality claims<sup>18</sup> can be remedied under other rights without the need to bother with listed and analogous grounds or human dignity, the two severe restrictions on the direct application of section 15.<sup>19</sup> The next sections of this paper explain the cases where this phenomenon has occurred.

### III. FREEDOM OF RELIGION

Section 2(a) of the *Charter of Rights* guarantees “freedom of conscience and religion.” The first two cases decided by the Supreme Court of Canada under section 2(a) concerned objections to Sunday closing laws by retailers.<sup>20</sup> In my view, the objection to Sunday closing laws is really an equality claim. The retailer who observes a Saturday sabbath (for example) will suffer a competitive disadvantage by closing on Saturday whether or not there is any legislation imposing a day of rest. The problem with Sunday closing laws is that they relieve the person who observes a Sunday sabbath from that competitive disadvantage. They do not prevent the Saturday observer from observing Saturday as the sabbath, nor do they compel any kind of religious observance on the Sunday. It is the favoured treatment of Christians, who observe a Sunday sabbath,

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<sup>17</sup> *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 97, 98, *per* Cory J. for majority.

<sup>18</sup> A more principled explanation of the cases would be that a claim to liberty or justice inescapably includes an implicit notion of equality. This is explicit, for example, in John Rawls’ “first principle of justice”: *A Theory of Justice* (Harvard U.P., 1971), at 60, 302; see also Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth, 1977), at 179-80; K.L. Karst, “Equality as a Central Principle in the First Amendment” (1975) 43 U. Chicago L. Rev. 20.

<sup>19</sup> Another approach, which has so far not attracted any judicial support, is to recognize equality as an “unwritten constitutional principle”: P. Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 Dal. L.J. 5.

<sup>20</sup> Later freedom of religion cases did not address the equality value of s. 2(a). After 1985, s. 15 could be invoked, and was invoked (as well as s. 2(a)) in *Reference re Bill 30, Act to Amend Education Act (sub nom. Reference re Act to Amend Education Act (Ontario))* (Ontario Separate School Funding), [1987] 1 S.C.R. 1148, and *Adler v. Ontario*, [1996] 3 S.C.R. 609, to challenge the failure to fund religious schools other than Roman Catholic separate schools in Ontario; this challenge was defeated by the special constitutional status of Roman Catholic separate schools in Ontario.

over non-Christians who observe other sabbaths, that provides the force of the constitutional argument. Since “religion” is one of the listed grounds of discrimination in section 15, it would seem that Sunday closing would fall on the sword of section 15 rather than section 2(a). What happened, however, was that challenges were brought against the federal and Ontario statutes during the first three years of the life of the *Charter of Rights*. Since section 15 had not come into force in this period, section 15 was not available to the challengers. If there was to be a remedy it could not be under section 15.

The first case was *R. v. Big M Drug Mart Ltd.*,<sup>21</sup> which was a challenge to the *Lord's Day Act*,<sup>22</sup> a federal statute that prohibited most commercial activity on Sundays. Justice Dickson (as he then was) for the majority of the Court found that the purpose of the Act, which he derived from the history and terms of the Act, was “to compel the observance of the Christian Sabbath.”<sup>23</sup> Such a purpose was not compatible with section 2(a) (and could not be justified under section 1). In the course of reaching this result, Dickson J. made clear that an equality value was part of section 2(a). He said that “A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon section 15 of the Charter.”<sup>24</sup> And he went on to say that “The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.”<sup>25</sup>

The second case was *R. v. Edwards Books & Art Emporium*,<sup>26</sup> which was a challenge to Ontario's *Retail Business Holidays Act*,<sup>27</sup> which prohibited retail stores from opening on Sundays. The legislative history of this Act showed that its purpose (unlike that of the *Lord's Day Act*) was not a religious one but the secular one of providing a common pause day for retail workers. Nonetheless, the majority of the Court held that the law infringed section 2(a) because its effect was to impose an economic burden on those retailers who observed a sabbath on a day other than Sunday. That effect created a competitive pressure to abandon a non-Sunday sabbath, which was an abridgment of freedom of

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<sup>21</sup> [1985] 1 S.C.R. 295. The Court was unanimous. Justice Dickson (as he then was) wrote the opinion of the majority. Justice Wilson wrote a separate concurrence, relying on the effect rather than the purpose of the Act to show the breach of the Charter.

<sup>22</sup> R.S.C. 1970, c. L-13.

<sup>23</sup> *Big M*, *supra*, note 21, at 351.

<sup>24</sup> *Id.*, at 336.

<sup>25</sup> *Id.*, at 337. This passage was quoted by Bastarache J. in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 22.

<sup>26</sup> [1986] 2 S.C.R. 713. Chief Justice Dickson wrote the majority opinion for himself and Chouinard and LeDain JJ. Justice Beetz wrote a concurring opinion for himself and McIntyre J. Justice La Forest wrote a concurring opinion. Justice Wilson wrote an opinion dissenting in part.

<sup>27</sup> R.S.O. 1980, c. 453.

religion. In this case, the Act was upheld, because a majority of the Court held that the Act was justified under section 1. As argued above, in my view, the reasoning is really based on equality, and as in *Big M*, Dickson C.J.'s reasoning for the majority in *Edwards Books* draws on equality ideas, including a repetition of his dictum that "a free society is one which aims at equality with respect to the enjoyment of fundamental freedoms."<sup>28</sup>

It is interesting to speculate whether the reasoning in *Big M* and *Edwards Books* would have been different if section 15 had been in force when the cases arose such that the injustice of which the complainants alleged could have been directly addressed under section 15. It certainly would have affected the reasoning and perhaps the result for Beetz J. in *Edwards Books*. Justice Beetz, who (with the agreement of McIntyre J.) wrote a concurring opinion, denied that there was a breach of section 2(a); in his view, the only argument against the Act was an equality one and the only place to make it was under section 15, which was not then in force. This point was surely unanswerable, unless section 2(a) itself has an equality component, which is what the majority opinion of Dickson C.J. must stand for.

#### IV. FREEDOM OF ASSOCIATION

Section 2(d) of the *Charter of Rights* guarantees "freedom of association." This right has been rather narrowly defined by the Supreme Court of Canada; and in particular, the Court has held that it does not include rights to collective bargaining and to strike, and does not impose on government any positive obligations to legislate. At common law, individuals have a right to associate, and what section 2(d) does is prevent governments from imposing restrictions on the right to associate (or at least to require any restrictions to be justified under section 1). In *Delisle v. Canada*,<sup>29</sup> the Supreme Court of Canada, in a majority opinion written by Bastarache J., held that the exclusion of members of the Royal Canadian Mounted Police (RCMP) from the federal *Public Service Staff Relations Act*,<sup>30</sup> which regulates labour relations in the federal public service, was not a breach of section 2(d). While the exclusion meant that the RCMP could not form a trade union and be certified under the Act, it did not impair their common law right to form an employee association (albeit an

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<sup>28</sup> *Edwards Books*, *supra*, note 26, at 757.

<sup>29</sup> *Supra*, note 6. The opinion of the majority was written by Bastarache J. with the concurrence of Gonthier, McLachlin and Major JJ. Justice L'Heureux-Dubé wrote a separate concurring opinion. Justices Cory and Iacobucci dissented, holding that the exclusion of the RCMP from the collective bargaining regime was a breach of freedom of association.

<sup>30</sup> R.S.C. 1985, c. P-35.



association with no power to bargain collectively or to strike). To be sure, the Act placed the RCMP in a worse position than other federal employees, but this argument amounted to a section 15 claim that could not be invoked because the legislative distinction between occupational groups was not a listed or analogous ground.<sup>31</sup>

In *Dunmore v. Ontario*,<sup>32</sup> the Supreme Court of Canada, with Bastarache J. again writing for the majority, held that the exclusion of agricultural workers from Ontario's *Labour Relations Act, 1995*<sup>33</sup> was a breach of section 2(d) (and could not be saved under section 1). On the face of it, this was exactly the same issue as had been resolved in *Delisle*, but with the opposite result. How did the case differ from *Delisle*? The Court offered two reasons. One was that, unlike the police officers in *Delisle*, who had formed their own association without the benefit of labour relations legislation, it was not feasible for the agricultural workers to form an employees' association without some assistance from the Legislature. The second was that, unlike the police officers in *Delisle*, who were employed by government, the agricultural workers were employed by private firms or individuals and could not rely on the direct application of the Charter to support their efforts to form an association. But surely the *ratio decidendi* of *Delisle* is equally applicable in *Dunmore*. The freedom to organize existed independently of any statute, and the exclusion of agricultural workers from the superior regime of the *Labour Relations Act* did not impair their freedom to organize. The agricultural workers were in the same position as if there was no *Labour Relations Act*. Their difficulties in forming an association stemmed from the inherent character of farm work and from resistance by their private employers, not from any action by the Legislature or government to which the Charter applied. This was the dissenting view of Major J., as well as the unanimous view of the Ontario judges at trial and in the Court of Appeal.

The agricultural workers in *Dunmore* were making an equality claim. The legislation from which they were excluded did not diminish their common law right to associate, but it did give superior rights to other workers in Ontario. The agricultural workers asked to be treated equally with the workers to whom the Act did apply, and the Court said yes. Justice Bastarache said that it was "not necessary" to consider section 15 of the Charter, because the remedy could be had under section 2(d).<sup>34</sup> With respect, that was a rather disingenu-

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<sup>31</sup> *Delisle*, *supra*, note 6, at para. 44, *per* Bastarache J. for majority.

<sup>32</sup> *Supra*, note 25. Justice Bastarache wrote the opinion for the majority of seven. Justice L'Heureux-Dubé wrote a concurring opinion. Justice Major wrote a dissenting opinion.

<sup>33</sup> S.O. 1995, c. 1.

<sup>34</sup> *Dunmore*, *supra*, note 25, para. 2. Of the majority judges, only L'Heureux-Dubé J. faced the issue directly in her concurring opinion, in which she held (at para. 170) that occupational status should be accepted as an analogous ground, and that the agricultural workers were entitled to

ous statement because, as Major J. pointed out in dissent, it was obvious on the basis of the prior case law that the agricultural workers would not be able to satisfy the analogous ground requirement that had defeated the police officers in *Delisle*. What the Court was doing in *Dunmore* was importing a Charter value of equality into the right to freedom of association in order to avoid its own insistence that equality claims must be based on listed or analogous grounds.

The Supreme Court of Canada's remedy in *Dunmore* was to sever the provision excluding agricultural workers from the *Labour Relations Act*. The severance had the effect of conferring on the formerly excluded workers the rights to collective bargaining and to strike. This would be a truly bizarre result if it really were based on the right to freedom of association, because Bastarache J. for the majority explicitly reaffirmed the Court's earlier holdings that freedom of association did not include the rights to collective bargaining and to strike.<sup>35</sup> Moreover, Bastarache J., in his discussion of section 1 justification, acknowledged that many farms in Ontario were family owned and operated, and were not suitable to formal processes of decision-making; he also acknowledged that the seasonal character of agriculture made it peculiarly vulnerable to work stoppages. These characteristics of Ontario's farm economy would justify the Legislature in withholding the rights to collective bargaining and to strike. The Court solved this problem by postponing its declaration of invalidity for 18 months to allow the Legislature time to enact a special regime of labour law for agricultural workers.

The special regime for agricultural workers would not have to include rights to collective bargaining and to strike, but it would have to include a "statutory freedom to organize" along with "protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms."<sup>36</sup> Since these rights exist at common law (which must itself reflect Charter values), the Court apparently believes that enacting them into a statute would make them more likely to be exercised (even if no collective bargaining or strike rights could be acquired by the effort). No doubt, time will tell if the Court is right. In any event, the effect of importing the equality value into section 2(d) was to convert the Legislature's negative duty to avoid impairing freedom of association into a positive duty to enact a statute to facilitate the organization of agri-

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succeed under s. 15 as well as s. 2(d). Justice Major, dissenting, also faced the issue directly, arguing that s. 15 did not apply in the absence of a listed or analogous ground.

<sup>35</sup> *Id.*, at para. 17.

<sup>36</sup> *Id.*, at para. 67.

cultural workers.<sup>37</sup> Presumably, laws will also have to be designed and enacted for the other groups who are excluded from the Ontario *Labour Relations Act* and whose labour relations are now governed by the common law, namely, workers employed in horticulture, hunting, or trapping, and domestics employed in private homes. Given the decision in *Dunmore*, the equality value in section 2(d) demands no less.

## V. RIGHT TO VOTE

Section 3 of the *Charter of Rights* guarantees to every citizen “the right to vote” in federal and provincial elections. In the *Saskatchewan Electoral Boundaries Reference*,<sup>38</sup> the province of Saskatchewan directed a reference to the courts to determine whether the electoral boundaries for elections to the province’s Legislature offended section 3. The constitutional challenge was based on the fact that the rural and northern constituencies contained fewer people than the urban constituencies. This was an equality challenge. No one had been denied the right to vote.<sup>39</sup> The problem was that the urban voters’ votes were not of equal weight to those of the rural voters. In the United States, where there is admittedly no equivalent to section 3 of the Charter, it has been held that a principle of equality of voting power is derived from the equal protection clause of the Fourteenth Amendment.<sup>40</sup> In Canada, however, an argument based on section 15 would almost certainly founder on the rock of analogous grounds, since it seems clear that place of residence (a freely chosen attribute) is not analogous to the grounds listed in section 15 and therefore cannot form the basis of an equality challenge under section 15.<sup>41</sup>

What the Supreme Court of Canada decided in the *Saskatchewan Electoral Boundaries Reference* was that section 3 contained its own requirement of equality. The Court held that section 3 guaranteed a right of “effective representation.” While a number of factors (including geography and settlement patterns) could properly be taken into account in designing electoral bounda-

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<sup>37</sup> Precursors of this result can be found in *P.I.P.S. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, at paras. 15, 19, 26, *per* Cory J. dissenting; *Delisle v. Canada*, *supra*, note 6, para. 7, *per* L’Heureux-Dubé J. concurring, paras. 72, 85, *per* Cory and Iacobucci JJ. dissenting.

<sup>38</sup> *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158. The majority judgment was written by McLachlin J. (as she then was) and concurred in by La Forest, Gonthier, Stevenson and Iacobucci JJ., and “substantially” by Sopinka J. who wrote brief concurring reasons. Justice Cory dissented with the agreement of Lamer C.J. and L’Heureux-Dubé J.

<sup>39</sup> Contrast *Sauvé v. Canada (Chief Electoral Officer)* (2002), 168 C.C.C. (3d) 449 (S.C.C.), striking down a provision disqualifying prisoners serving sentences of more than two years.

<sup>40</sup> *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>41</sup> *Supra*, note 8.

ries, “parity of voting power” was the factor of “prime importance”: the “citizen whose vote is diluted” suffers from “uneven and unfair representation.”<sup>42</sup> The Court divided on whether Saskatchewan’s liberal allowances for population disparities between urban and rural constituencies violated the rule of effective representation. Justice Cory for the dissenting minority would have held that each vote was not of sufficiently equal value and that section 3 was therefore offended. But McLachlin J. for the majority held that the factors of geography and settlement patterns provided a sufficient explanation for the inequalities in voting power to satisfy section 3; the challenge was accordingly rejected. None of the judges made reference to section 15, and all agreed on the presence of an equality value in section 3.

## VI. FREEDOM OF EXPRESSION

The freedom of expression cases do not provide any examples of an equality value being imported into section 2(b), which is the provision of the Charter that guarantees “freedom of ... expression.”<sup>43</sup> In fact, an equality claim was made in two cases arising out of the Charlottetown Accord, (a set of constitutional proposals negotiated in 1992 and put to a referendum in which the proposals were defeated). In *Haig v. Canada* (1993),<sup>44</sup> the Supreme Court of Canada considered the situation of a person who could not vote in the referendum because he did not satisfy the residency requirements. The Court acknowledged that the casting of a ballot in the referendum was a means of expression, but held that section 2(b) did not require that everyone be consulted on a referendum. The plaintiff’s exclusion could only be remedied under section 15 and since place of residence was not an analogous ground, no remedy was available.

In the second case, *Native Women’s Assn. of Canada v. R.*,<sup>45</sup> the Native Women’s Association of Canada (NWAC) claimed that there was a breach of freedom of expression when the government funded and invited the participation of other native groups in the constitutional discussions but neither invited nor funded NWAC. The Court rejected the argument that section 2(b) required equality of treatment in the funding or consulting of native groups. The exclusion of NWAC could be remedied only under section 15, and a breach of section 15 had not been made out.

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<sup>42</sup> *Supra*, note 37, at 183-84, *per* McLachlin J. for majority.

<sup>43</sup> Cf. K.L. Karst, “Equality as a Central Principle in the First Amendment” (1975) 43 U. Chicago L. Rev. 20 (arguing that the First Amendment contains a “principle of equality”).

<sup>44</sup> [1993] 2 S.C.R. 995.

<sup>45</sup> [1994] 3 S.C.R. 627.

Contrast these two cases with the cases earlier described under freedom of religion, freedom of association, and the right to vote. In those three areas, when an equality claim could not be remedied under section 15, it was remedied under section 2(a) (in the cases of *Big M* and *Edwards Books*), under section 2(d) (in the case of *Dunmore*), and under section 3 (in the case of the *Saskatchewan Electoral Boundaries*). It is unlikely that the striking difference in reasoning and result depends on any peculiar characteristic of the right to freedom of expression in section 2(b). It is more likely that the Court did not find the *Haig* and *NWAC* cases as deserving of redress as the four cases already mentioned. However, it would have been more helpful and consistent if the Court in *Haig* and *NWAC* had at least acknowledged the possibility of redressing an equality claim under section 2(b).

In all the cases considered so far, the equality value was asserted by the same persons as asserted the fundamental freedom, and the purpose of the assertion was to *expand* the fundamental freedom. In *Dunmore*, for example, the agricultural workers relied on the equality value as an element of freedom of association; and they succeeded in being added to the groups covered by the labour relations statute. But in a series of cases under the rubric of freedom of expression — cases dealing with hate propaganda and pornography — an equality value has been asserted by persons other than those who claimed the right to freedom of expression; and the purpose of the assertion was to *narrow* the fundamental freedom. In these cases, the equality value is an enemy rather than an ally of freedom of expression.

The hate propaganda provision of the *Criminal Code*<sup>46</sup> makes it an offence to wilfully promote hatred against “any section of the public distinguished by colour, race, religion or ethnic origin.” In *R. v. Keegstra*<sup>47</sup> the conviction of Mr. Keegstra, a schoolteacher who had made anti-semitic statements to his students, was affirmed. Here the Supreme Court of Canada had to decide whether this offence violated section 2(b). One approach would be to say that section 2(b) should be interpreted in the light of section 15, so that freedom of expression would not extend to speech of which the only purpose was to promote hatred against vulnerable minority groups. The analogy here would be the doctrine of “mutual modification” that is used to interpret the categories of federal and provincial powers that are listed in sections 91 and 92 of the *Constitution Act, 1867*.<sup>48</sup> Each head of power (trade and commerce, for example) is interpreted in its context and may be narrowed to accommodate an ostensibly conflicting or

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<sup>46</sup> R.S.C. 1985, c. C-46, s. 318(4).

<sup>47</sup> [1990] 3 S.C.R. 697.

<sup>48</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

overlapping category (property and civil rights, for example).<sup>49</sup> The Court refused to take this approach to the interpretation of section 2(b), reaffirming instead the doctrine that freedom of expression extends to all statements, no matter how harmful, offensive, or worthless the content of a statement may be. However, the Court did not lose sight of the equality value that the *Criminal Code* offence sought to promote. The value was relevant to the section 1 inquiry. In assessing the importance of the objective of the limiting law, it was relevant to note that the promotion of the Charter value of equality was an important objective. And, in determining the degree of deference that was appropriate, it was relevant to note that speech designed to undermine the value of equality was far from the core of the values that the guarantee of freedom of expression was intended to protect. Armed with these ideas, the Court went on to hold — but only by the narrow majority of four to three — that the hate propaganda offence should be upheld under section 1.

A similar process of reasoning was used by the Supreme Court of Canada in *R. v. Zundel*,<sup>50</sup> where the Court had to review the “false news” provision of the *Criminal Code*, section 181, which made it an offence for a person to “wilfully [publish] a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest.” Zundel, who had published pamphlets asserting that the Holocaust was a fraud invented by an international conspiracy of Jews, was charged under this provision. He defended the charge by invoking his right to freedom of expression under section 2(b). The Court did not shrink from its content-neutrality doctrine and held that deliberate lies were protected by section 2(b). This meant that, as in *Keegstra*, the outcome turned on the section 1 inquiry, and, as in *Keegstra*, the section 1 inquiry divided the Court. In *Zundel*, however, the opposite result was reached: the majority held that the law could not be justified under section 1. The difference was caused by the fact that the false news offence was broader than the hate propaganda offence and could not as easily be justified as focused on the promotion of equality.<sup>51</sup> In the end, therefore, the false news offence was struck down and Mr. Zundel was acquitted.

The use of section 1 to bring the equality value into the assessment of a claim to freedom of expression was certainly contemplated by Dickson C.J. in

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<sup>49</sup> Hogg, *supra*, note 4, ch. 15, Judicial Review on Federal Grounds, under heading 15.9(b), “Exclusiveness.”

<sup>50</sup> [1992] 2 S.C.R. 731.

<sup>51</sup> A similar concern with equality pervades the pornography cases, where the speech is held to be constitutionally protected, but the objective of preventing harm to women and children is held sufficient to uphold the law under s. 1: *R. v. Butler*, [1992] 1 S.C.R. 452 (*Criminal Code* offence of possessing and selling “obscene” material upheld); *R. v. Sharpe*, [2001] 1 S.C.R. 45 (*Criminal Code* offence of possessing “child pornography” upheld).

*R. v. Oakes*.<sup>52</sup> In his classic elaboration of the standards to be used for section 1 justification, he said there that the Court must be guided by the values of a free and democratic society, which included a “commitment to social justice and equality.”<sup>53</sup> Moreover, there is the practical issue of the burden of proof. If section 2(b) itself was held not to protect expression that impaired the equality rights of others, then the person claiming the right to freedom of expression would be placed in the position of having to prove that his expression did not impair the equality rights of others. Under section 1, it is for the party supporting the challenged law to prove the facts needed for section 1 justification. These are reasons that support the Court’s ruling that the invocation of an equality value in opposition to a fundamental freedom should be dealt with in the section 1 analysis. In the next section of this paper, however, we shall see that this has not been the approach of the Court under section 7. In a series of sexual assault cases, the balancing of the right to full answer and defence (asserted by the accused) against the rights to privacy and equality (asserted by the complainants) has taken place within section 7 itself, and section 1 has played no role in the outcomes.

## VII. FUNDAMENTAL JUSTICE

Section 7 of the *Charter of Rights* guarantees “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The Supreme Court of Canada has decided that the principles of fundamental justice include principles of substantive law as well as procedure, and this expansive view has not been reined in by anything other than extraordinarily vague definitions of fundamental justice, of which the most precise is “the basic tenets of the legal system” (but without any agreement on what those basic tenets are) and the least precise is simply a vague reference to finding “the right balance” between liberty and competing values.<sup>54</sup> There is plenty of room for the equality value in this mansion, and rules affecting life, liberty, or security of the person that operate in an unequal or arbitrary way are likely to be struck down as breaches of fundamental justice.

Unequal access to abortion from one region of the country to another was one of the deficiencies in Canada’s therapeutic abortion law that led to its being struck down under section 7 by the Supreme Court of Canada in *R. v. Morgent-*

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<sup>52</sup> *Supra*, note 13.

<sup>53</sup> *Id.*, at 136.

<sup>54</sup> See Hogg, *supra*, note 4, heading 44.10(b) “Definition of fundamental justice.”

*taler*.<sup>55</sup> The division of opinion in the Court in *Rodriguez v. British Columbia (Attorney General)*,<sup>56</sup> where the Court by a narrow majority of five to four upheld the validity of the crime of assisting suicide, really turned on equality issues. The dissenters were impressed by the point that the law created no problems for an able-bodied person who wished to take her own life (suicide and attempted suicide not being crimes), but the law was a grave impediment to a person who (like the plaintiff) was disabled and could not commit suicide unassisted. For the majority, an exception for disabled people would itself be an unacceptable inequality. And in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*,<sup>57</sup> where the Court held that section 7 required that legal aid be provided to parents whose children were subject to removal proceedings, the concurring opinion of L'Heureux-Dubé J. relied on equality values (disproportionate effect on single women) in its reasoning.<sup>58</sup>

In these cases, the person asserting the right to life, liberty, or security of the person is the person relying on the equality value to *expand* the scope of fundamental justice. However, the Supreme Court of Canada will also take account of the equality rights of others, even when they are in conflict with the interests of the person claiming the section 7 right. When that occurs, the equality value has the effect of *narrowing* the requirements of fundamental justice.

One of the principles of fundamental justice is the right of an accused person to present full answer and defence. In sexual assault cases, this right can come into conflict with privacy and equality values asserted by complainants, who seek to avoid an invasive inquiry into their sexual history (on issues of consent and credibility). In *R. v. Seaboyer*,<sup>59</sup> a majority of the Supreme Court of Canada struck down a “rape-shield” law enacted by Parliament that limited the right of the defence to cross-examine the complainant about her past sexual history. The majority of the Court, in an opinion written by McLachlin J., acknowledged the need to place limits on the cross-examination of the complainant, but they held that this law went too far, because it would occasionally have the effect of excluding evidence that was relevant to full answer and defence. The dissenting minority, in an opinion written by L'Heureux-Dubé J., took the view

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<sup>55</sup> [1988] 1 S.C.R. 30. All three majority judgments (Dickson C.J., Beetz J. and Wilson J.) were impressed by the regional inequality. Note that differences between provinces and areas of a province has always been rejected as an “analogous ground” in s. 15 analysis.

<sup>56</sup> [1993] 3 S.C.R. 519. For the majority, Sopinka J. rejected arguments based on ss. 7 and 15. In dissent, McLachlin J. (with L'Heureux-Dubé J.) relied on s. 7, Lamer C.J. on s. 15, and Cory J. on both ss. 7 and 15.

<sup>57</sup> [1999] 3 S.C.R. 46.

<sup>58</sup> *Id.*, at paras. 112-14.

<sup>59</sup> [1991] 2 S.C.R. 577. Justice McLachlin wrote the opinion for the majority of seven; L'Heureux-Dubé J. wrote a dissenting opinion for herself and Gonthier J.



that the evidence excluded by the rape-shield provision was all either irrelevant or so prejudicial to the fairness of the trial that it could and should properly be excluded. Justice L'Heureux-Dubé was particularly concerned about equality issues related to the prevention of violence against women, the encouragement to report complaints of sexual assault, and the elimination of discriminatory stereotypes about the effect of prior sexual activity on issues of credibility and consent.

The decision in *Seaboyer* forced Parliament to redraft the rape-shield law, which it did without much change, but with a new discretion in the trial judge to admit evidence adjudged to be relevant and of sufficient probative value so as not to be outweighed by the danger of prejudice to the proper administration of justice. This discretion addressed the concern of the majority in *Seaboyer* while also addressing the points made by L'Heureux-Dubé J., and the revised law was upheld unanimously by the Court in *R. v. Darrach*.<sup>60</sup> The Court held that it was appropriate to take into account the equality right of the complainant when assessing the validity under section 7 of limits on the defence's right of cross-examination. Note that this assessment all took place under section 7 and that it was not necessary for the Court to shift into the section 1 inquiry.

A related issue arose in *R. v. O'Connor*,<sup>61</sup> where the accused, a Catholic Bishop, who was charged by four former students with sexual assaults alleged to have been committed while he was the principal of a native residential school, sought an order requiring disclosure of the complainants' school, medical, and counsellors' records. The Supreme Court of Canada unanimously agreed that in certain circumstances the disclosure of confidential records would be needed to enable an accused person to make full answer and defence. The Court was also unanimous that a procedure had to be devised to strike a proper balance between the defence's interest in full information and the complainants' interest in the privacy of confidential records, as well as the equality issues raised by the risk of discouraging the reporting of sexual assaults and the risk of prejudicial conclusions about credibility and consent being drawn from information about the lifestyles of the female complainants. A majority of the Court, in an opinion written by Lamer C.J. and Sopinka J., then devised an onerous procedure to be gone through before records could be disclosed. The minority of the Court, in an opinion written by L'Heureux-Dubé J., would have preferred an even more onerous procedure, making disclosure even more diffi-

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<sup>60</sup> [2000] 2 S.C.R. 443. The bench included L'Heureux-Dubé and Gonthier JJ., who were the two dissenters in *Seaboyer*, and the opinion of the Court was written by Gonthier J.

<sup>61</sup> [1995] 4 S.C.R. 411. On the issue discussed in the text, the Court divided five to four, with the majority opinion being written by Lamer C.J. and Sopinka J., and the minority opinion being written by L'Heureux-Dubé J.

cult to achieve. Both the majority and the minority opinions agreed that the right to make full answer and defence under section 7 was not an absolute right, but one that must at times yield to other constitutional values, including that of equality.<sup>62</sup> The disagreement was over the precise balance between the accused's right to full answer and defence, and the values of privacy and equality.

After the decision in *O'Connor*, Parliament enacted a procedure to obtain disclosure of confidential records of complainants in criminal cases. Parliament evidently thought that the procedure laid down by the majority in *O'Connor* was insufficiently protective of the complainants' privacy and equality interests, and the new statutory procedure bore a striking resemblance to the stricter standards suggested in the dissenting opinion of L'Heureux-Dubé J. Not surprisingly, the statutory procedure quickly faced a constitutional challenge. After all, under the statutory procedure some material would be withheld from the defence that under the majority *O'Connor* procedure would have to be disclosed. What was surprising was that the Supreme Court of Canada in *R. v. Mills*<sup>63</sup> upheld the new statutory procedure. What was even more surprising was that the Court did not rely on section 1 (despite a long preamble in the legislation clearly crafted to help satisfy the *Oakes* standards). The Court never reached section 1, because in defining what was required to satisfy the principles of fundamental justice in section 7, the Court deferred to Parliament's considered judgment as to the appropriate balance between the competing constitutional values. The Court praised the notion of a "dialogue" between the Court and Parliament, and noted that Parliament and the government had undertaken an extensive consultation that included consideration of the opinions in *O'Connor* and of the experience of criminal courts in applying *O'Connor*. The Court concluded that, although the new statutory procedure gave more weight to privacy and equality than had the majority in *O'Connor*, the statutory procedure gave enough weight to the accused's right to make full answer and defence to satisfy section 7.

For present purposes, what is interesting about *Mills* and the other cases dealing with full answer and defence in sexual assault cases is the explicit incorporation into section 7 of the constitutional value of equality, despite the fact that it has the effect of narrowing the principles of fundamental justice that are guaranteed by section 7. This is exactly what the Court in *Keegstra* refused to do to freedom of expression when faced with legislation that limited expres-

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<sup>62</sup> *Id.*, at paras. 31-32, *per* Lamer C.J. and Sopinka J., paras. 106, 120-24, *per* L'Heureux-Dubé J.

<sup>63</sup> [1999] 3 S.C.R. 668. On the main issue, the Court was unanimous. A majority opinion was written by McLachlin and Iacobucci JJ. Chief Justice Lamer wrote a separate opinion dissenting from only part of the majority opinion (with respect to disclosure of records in the possession of the Crown).

sion in the service of equality. The Court sees the principles of fundamental justice in much more qualified and pragmatic terms than freedom of expression, which must as a matter of principle (so it seems) be kept content-neutral and therefore very broad. Of course, as we noticed, the equality value is not lost in the freedom of expression cases; it is used in the section 1 analysis. From the point of view of the results, it may make little difference where the equality value is introduced into the analysis, so long as it is recognized at some point that is critical to the decision.<sup>64</sup>

### VIII. CONCLUSION

What conclusions can be drawn from the foregoing account of the cases? One obvious conclusion is that the protection of equality in the *Charter of Rights* is not confined to section 15 and the supplementary guarantees of section 27 (multicultural heritage) and section 28 (sexual equality). In the context of the fundamental freedoms of religion, expression, assembly, and association, laws that treat different groups unequally, even on grounds that would not qualify for a section 15 challenge, may be struck down on the basis of an equality value in section 2. This is also true of the right to vote in section 3 and probably other Charter rights as well.<sup>65</sup> Where freedom of expression is exercised to the detriment of vulnerable minorities, the equality values asserted by the victims will also be recognized, not by narrowing down section 2, but as part of the balancing of interests required for the section 1 analysis. In cases where life, liberty, or security of the person is engaged, so that section 7 applies, the requirements of fundamental justice are derived by a balancing of various interests including the value of equality. That balancing takes place within section 7, not within section 1.

While not every assertion of an equality value outside section 15 has been successful in the Supreme Court of Canada, the success rate is high and it is plain from the language of the opinions that the equality value is always taken seriously. What is interesting about this development is that it runs in parallel with the Court's efforts to cut down the scope of the explicit equality guarantee in section 15. The restriction to listed or analogous grounds of discrimination

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<sup>64</sup> Theoretically, the imposition of the burden of proof on the person claiming the s. 7 right may give some advantage to the persons claiming the equality right. Whether this is so in practice, given the rather loose notions of proof that courts accept in establishing social and economic facts in constitutional cases, is a matter for debate or perhaps more experience.

<sup>65</sup> Police practices that improperly rely on considerations of race may also offend s. 8 of the Charter: *R. v. Golden*, [2001] 3 S.C.R. 679, at para. 83; or s. 9 of the Charter: D.M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall L.J. 145, at 179.

and the requirement of an impairment of human dignity, which are now insisted upon for a section 15 claim of equality, are usually not mentioned when the Court applies a Charter value of equality in the context of a right other than section 15. I speculate that there is a connection between the two contrary tendencies in the Court's jurisprudence, but if that is true it is still hard to understand, since a judicial sentiment that section 15 was being hedged by too many restrictions could be addressed directly by loosening those restrictions or not imposing new ones (like human dignity).

The effect of the decisions is to draw a distinction between laws that regulate the exercise of Charter rights, such as freedom of religion, freedom of expression, freedom of association, and the right to vote, and laws that regulate behaviour that does not implicate Charter rights. The former category is reviewable under the looser Charter value of equality, so that any irrational difference of treatment is likely to lead to invalidity. The latter category is reviewable under the section 15 guidelines, so that differences of treatment lead to invalidity only if they involve listed or analogous grounds and impair human dignity. Although the Court has not attempted to articulate or justify this distinction, perhaps it makes sense. To be sure, it expands equality review, but not to an unmanageable extent, as it would if all laws could be struck down for the use of irrational classifications. Only laws that have a negative effect on the exercise of a Charter right are subject to this heightened level of judicial scrutiny. Other laws are reviewable on equality grounds only if they use classifications that are based on a listed or analogous ground and impair human dignity. For the most part, then, the Court is still restraining itself to remedying only the most serious kinds of discrimination, and is not attempting to review every classification made by the elected Parliament or Legislature.

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